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May 27, 2014

Via ECF

Honorable Allyne R. Ross
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Vincent Asaro, et al.,
14 Cr. 26 (ARR)

Dear Judge Ross:

I write on behalf of defendants Vincent Asaro, Jerome Asaro, Thomas DiFiore and John Ragano in advance of the status conference scheduled for tomorrow to alert the Court of issues counsel wishes to address. The issues revolve around the protective order currently in effect and the separation orders put into effect on or about May 9, 2014. All four of these defendants are in custody at the Metropolitan Detention Center ("MDC").

The Protective Order

On or about January 28, 2014, at the request of the government, Your Honor signed a protective order which precludes the defendants from obtaining copies of the consensual recordings in this matter for their own personal review and inspection. Rather, under the terms of the order, "[c]ounsel for the defendants may review the Protected Materials with the defendants but may not permit the defendants to retain them." (Exhibit A – Protective Order– page 1)

In making its application to the Court, the government indicated that it had provided defense counsel with "**a consensual recording** made by a cooperating witness for the government" and that the government intended to provide "**additional consensual recordings** of a cooperating witness." The government purportedly made this application "because there [was] reason to believe that the dissemination of such materials beyond the defense in this case will jeopardize the safety of the cooperating witness who is involved in that investigation, and the witness's family." (Exhibit B – Gov't Letter of 1/23/14 - page 1) *Emphasis supplied.* No additional showing of good cause was proffered to the Court.

The government further advised Your Honor that the protective order "will not prejudice the defendants since they will have access to the material and may cross examine the government's cooperating witness about statements and conduct during the consensually recorded conversations at trial." (Exhibit B – Gov't Letter of 1/23/14 - page 2)

The government failed to advise the Court of several important facts. First, what was disclosed to counsel was not simply "**a consensual recording**" followed by "**additional consensual recordings.**" Rather, the government produced **hundreds of hours** of consensual recordings of the defendants that were made over a period of several years. Accordingly, what is at issue here is not just statements made by the government cooperator, but statements allegedly made by the defendants themselves. Many of these recordings are difficult to hear in the best possible situation, but the conditions as the MDC make it impossible. (*See below.*)

Moreover, while the government proffered to the Court that there is "reason to believe that the dissemination of such materials … will jeopardize the safety of the cooperating witness …, and the witness's family" as the sole reason for obtaining the protective order, what the government failed to tell the Court is that the cooperator is not an unknown. Indeed, he is the cousin of Vincent and Jerome Asaro, a fact that is well known to all the defendants and was reported in the Newspapers. This blood relative of the Asaros has not been seen or heard from by any of the defendants since June of 2013. The defendants were not arrested until January 23, 2014. Given the cooperators long term association with the government, it is more than likely that he, and any family member who wanted to join him, are in the government's witness security program. In addition, in the now four months that have past since the revelation of this individual's cooperation, there has been no conduct or action on the part of the defendants that provides **any reason** to believe that he or his family are in danger at their hand.

Further, while protective orders are routinely granted in this District at the request of the government, counsel for the government in this case is only able to cite to two cases which include the extremely prohibitive language employed in the order requested in this case. One case is United States v. Basciano, 03 Cr. 929 (NGG). In Basciano, the death eligible defendant was alleged to have made death threats against both the judge and the prosecutor in his case, a situation which is clearly not present in the instant matter. However, a review of the public docket sheet did not yield a result for the protective order cited by the government. In the second cited case, United States v. Grasso, et al., 12 Cr. 447 (SJ), the government submitted to the District Court nearly the exact letter it submitted to this Court when seeking the protective order. Indeed in that application the government cited the same exact concern without out any further rational or justification *i.e.* "because there [was] reason to believe that the dissemination of such materials beyond the defense in this case will jeopardize the safety of the cooperating witness who is involved in that investigation, and the witness's family." (Exhibit C – Gov't letter of 3/15/13 – page. 1) And while the government appears to cite an additional case in which such a restrictive protective order was granted, United States v. Badalamenti, 05-Cr 60 (NGG), the docket number cited by the government lists the lead defendant as Vincent Basciano and the protective order could not be located at the docket entries cited by the government. (Exhibit C – Gov't letter of 3/18/13 – page. 2)

By way of comparison, in United States v. Russo, 11 Cr. 30 (KAM), United States v. Messina, 11 Cr. 31 (KAM), United States v. Bombino, 10 Cr. 147 (SLT) United States v. Balzano, 11 Cr. 32

(KAM), cases which involved dozens of defendants alleged to be involved in the highest ranking positions of organized crime, the defendants were permitted under the terms of their protective orders to review the materials independent of counsel. (Exhibit D – Various alternative protective orders). (See also United States v. Bombino, 10 Cr. 147 Docket Entry 89.) It is important to note that these materials also contained scores of consensual recordings made by individuals who were cooperating with the government. Given the sheer number of hours of recordings in this case, and the lack of any specific threat, the protective orders in these cases are far more appropriate.

Absent a further showing of specific "good cause" as required by Rule 16 (d)(1) of the Federal Rules of Criminal Procedure, and not just mere regurgitated speculative language on the part of the government, the protective order must be lifted. In the alternative, it should be modified to allow the defendants a meaningful opportunity to review the discovery, independent of counsel, and prior to trial.

The Separation Orders

In addition to the complications posed by the restrictive protective order, on May 9, 2014, at the request of the government, the MDC placed separation orders between all four of the above referenced defendants. There was no incident that prompted the separation orders and indeed three of the defendants had been housed together on the same floor without incident prior to May 9, 2014. The separation orders have severely curtailed both counsels' access to their clients, and the discovery review process resulting in the defendants' inability to prepare for trial and a denial of their due process rights.

A separation order at the MDC implicates more than housing. A separation order dictates that the defendants can never be on the same floor together unless they are at a prearranged co-defendant meeting where counsel is present. Accordingly, if one of the defendants is on a legal or social visit, another attorney cannot visit their client.

On or about May 14, 2014, I arrived at the MDC to visit with Vincent Asaro. After arriving at the institution I waited three and one half hours to see him as another defendant was attending a legal visit and then a second defendant had a social visit. When Mr. Asaro finally did arrive to the visiting room, there was no room available in which we could review the discovery as the only two rooms with speakers were occupied. When those rooms cleared, Mr. Asaro was taken back upstairs for the afternoon count. A similar situation occurred on May 21, 2014, when Mr. Zissou attempted to visit with Mr. DiFiore. Given the number of hours of recordings, time is of the essence and unfortunately these incidents happened with regularity.

Scheduling around the separation order and other concerns is impossible. Currently all four defendants have visiting on different days, thus unless counsel wishes to deny the defendants their right to visit with their loved ones once a week for a one hour period then those times must be avoided. In addition, all of the defendants have commissary on different days. If they are not present on the floor when the commissary arrives then they miss commissary for that week. Furthermore, Mr. DiFiore must be present on his floor during certain times or his will miss medical treatment. Finally, there are no co-defendant meetings at the MDC on Saturday or Sunday.

However, given number of hours of recordings in this case, and the fact that counsel must be present under the terms of the protective order, the attorneys have made a significant efforts to coordinate our schedules so that the defendants can review the discovery. This has proven to be an impossible task despite our best efforts. After navigating a myriad of administrative requirements prior to arriving at the MDC, it takes approximately sixty to ninety minutes to get the defendants assembled. This is based in large part because the separation orders do not allow them to ride on the elevator together. Upon arriving in the visiting room, there are eight rooms for counsel to speak with clients. Two of those rooms do not have computers at all. Of the remaining six some of the computers do not read the discs properly and only two have speakers. Of the two rooms that have speakers, only one is big enough to accommodate all the defendants. Counsel is not permitted to move equipment from one room to another and the MDC will not reserve a room when we have scheduled a co-defendant meeting.

Accordingly, there have been times when other attorneys (unrelated to this case) were reviewing audio files with their clients and thus there was no place to review the recordings with these defendants. Such was the case for me on May 14, 2012. Further, of the two rooms that have both speakers and computers, the equipment is so antiquated that it is difficult to hear the conversations at all. One literally has to hold the speaker directly to your ear to make out the conversation. While frequently you can hear the cooperator's words as he is wearing the recording device, the target of the recording is often across a table in a crowded public place. Even given an optimal setting these conversations are next to impossible to hear, however, when the social visits start at the MDC and one is trying to hear these conversations above two hundred people including crying children using antiquated equipment it is simply impossible. This means that each conversation must be listened to numerous times to make certain that it is completely understood. To date the government has provided no transcripts to aid in this process.

We have attempted to work these issues out with the MDC. However, we have been advised that we cannot bring in any of our own equipment even if we were to donate it to the institution. Every proposal has been rejected. It is estimated thus far that the attorneys in this case have expended a collected sixty hours in an effort to review the discovery with the defendants. The result is that the defendants have been able to review three full recordings each approximately one hour in length. All of this could be avoided if the defendants were able to listen to the recordings independent of counsel.

Prejudice to the Defendants

For no apparent reason these defendants have been placed in such extreme restraints that a review of the discovery will take years to complete. There is no question that this is extremely prejudicial. The limitations placed upon the defendants deny them the fundamental right to prepare for trial and thus results in a denial of their due process rights. We ask the Court to intervene to make certain that the defendants' Constitutional rights are protected.

Respectfully submitted,

Elizabeth E. Macedonio

Elizabeth E. Macedonio
Counsel for the Defendant
Vincent Asaro

Exhibit A

F. #2014R0055

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

28

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

VINCENT ASARO,
JEROME ASARO,
JACK BONVENTRE,
THOMAS DI FIORE,
also known as "Tommy D," and
JOHN RAGANO,
also known as "Bazoo,"

Defendants.

- - - - - - - - - - - - - - - - X

PROPOSED ORDER

Cr. No. 14-CR-26 (ARR)

Upon the January 23, 2014 application of Loretta E. Lynch, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Nicole M. Argentieri and Alicyn L. Cooley,

IT IS HEREBY ORDERED that the compact disc containing a consensual recording of a cooperating witness for the government provided to defense counsel on January 23, 2014 and any additional recordings of cooperating witnesses provided at a future date in relation to the above-captioned matter (collectively, the "Protected Materials"), may not be copied or provided to the defendants or other third parties. Counsel for the defendants may review the Protected Materials with the defendants, but may not permit the defendants to retain them. Further, defense counsel must return the Protected Materials to the government at the conclusion of the trial if the defendants are acquitted on all counts, or in the case of a conviction at trial or by guilty plea, upon completion of sentencing and appeal, if any.

The Honorable Allyne R. Ross
United States District Judge
Eastern District of New York

Exhibit B

U.S. Department of Justice

United States Attorney
Eastern District of New York

NMA/ALC
F.#2014R0055

271 Cadman Plaza East
Brooklyn, New York 11201

January 23, 2014

By ECF

The Honorable Allyne R. Ross
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Vincent Asaro, et al.
Criminal Docket No. 14-26 (ARR)

Dear Judge Ross:

Earlier today, as Exhibit A to its memorandum of law in support of pretrial detention, the government produced to defense counsel a consensual recording made by a cooperating witness for the government. Additionally, pursuant to Rule 16 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, the government intends to produce in short order additional consensual recordings of a cooperating witness.

The government respectfully moves for a protective order, pursuant to Fed. R. Crim. P. 16(d)(1), that would prevent the dissemination, beyond the defendants (while present with their attorneys), the defense attorneys, and the attorneys' legal staff, of the compact discs containing the consensual recordings described above that the government has produced in discovery. The government also respectfully requests that the Court order that this discovery material be returned upon the conclusion of the case. As set forth below, the government makes this application because there is reason to believe that the dissemination of such materials beyond the defense in this case will jeopardize the safety of the cooperating witness who is involved in that investigation, and the witness's family.

Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides that, upon a sufficient showing, a court may order that the discovery or inspection of material which is otherwise required be denied, restricted or deferred. The final decision on whether to enter such an order is a matter for the discretion of the district court and such an order will not be overturned absent an abuse of that discretion. United States v. Merrill, 746 F.2d 458, 465 (2d Cir. 1985). The Jencks Act does not create a proprietary right to any government witness's statements. The Act requires only that the government make these statements available to the defendants for the purposes of cross examination, and sets forth the timing of such disclosures. See United States v. Garcia, 406 F. Supp. 2d 304, 305 (S.D.N.Y. 2005) ("Jencks requires the Government to produce copies of its witnesses' statements for inspection by the defense, for purposes of cross examination. It does not give defendants a property interest in such statements, or require the multiplication of copies of internal prosecution notes or reports for whatever use the defendants choose to make of them.").

As courts have held, the danger posed to witnesses as a result of the unwarranted disclosure of discovery and Jencks Act materials is significant. Cooperating and civilian witnesses who testify and make recordings of their criminal co-conspirators are subject to harassment or worse. Dissemination of Jencks Act material increases the risk to cooperating witnesses, even if their cooperation has previously been disclosed. The court in Garcia explained as follows:

> There will be cases . . . in which a casual attitude toward the handling of 3500 material is ill advised . . . . In particular, the wide dissemination of statements by cooperating witnesses who are regarded as "snitches" or "rats" by their criminal associates . . . poses obvious dangers. It is not enough to say, as the defendants argue in this case, that the damage is done by the mere disclosure that a witness has cooperated with the authorities. Hard evidence of the witness's betrayal can facilitate retaliation or intimidation of the witness. It is therefore appropriate, in a case where such retaliation may be feared, to restrict the circulation of such material.

Garcia, 406 F. Supp. 2d at 306.

A protective order preventing further dissemination of this material will not prejudice the defendants since they will have access to the material and may cross examine the government's cooperating witness about statements and conduct during the consensually recorded conversations at trial. Similar motions have been made, and granted, in trials in this district. See, e.g., United States v. Basciano, No. 03-CR-929 (NGG), Docket No. 420, at 28 (E.D.N.Y.) (Order dated Jan. 3, 2006); United States v. Grasso, et al., No. 12-CR-447 (SJ), Docket Nos. 51, 81 (E.D.N.Y.).

For the reasons set forth herein, the government respectfully moves for a protective order pursuant to Federal Rule of Criminal Procedure 16(d)(1) that would prevent the dissemination of such recordings beyond the defendants (while present with their attorneys), the defense attorneys and their legal staff. The government also respectfully

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requests that the Court order that this discovery material be returned to the government at the conclusion of this case. Further, the government respectfully requests that any additional recordings made by cooperating witnesses provided to defense counsel in relation to the above-captioned matter (and designated as such) be subject to the terms of the attached protective order. A proposed order is attached.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: ______/S________________
Nicole M. Argentieri
Alicyn L. Cooley
Assistant U.S. Attorneys
(718) 254-6232/6389

Exhibit C

U.S. Department of Justice

United States Attorney
Eastern District of New York

NMA

271 Cadman Plaza East
Brooklyn, New York 11201

March 18, 2013

By ECF

The Honorable Sterling Johnson
United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Luigi Grasso, et al.
Criminal Docket No. 12-447 (SJ)

Dear Judge Johnson:

In a letter dated today, the government furnished discovery, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, including three recordings made by a cooperating witness, bates-labeled 5828. Those materials have been produced to a copy center and are available for copying by the defendants.

The government respectfully moves for a protective order, pursuant to Fed. R. Crim. P. 16(d)(1), that would prevent the dissemination, beyond the defendants (while present with their attorneys), the defense attorneys, and the attorneys' legal staff, of the compact disc containing the consensual recordings described above that the government has produced in discovery. The government also respectfully requests that the Court order that this discovery material be returned upon the conclusion of the case. As set forth below, the government makes this application because there is reason to believe that the dissemination of such materials beyond the defense in this case will jeopardize the safety of the cooperating witness who is involved in that investigation, and the witness's family.

Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides that, upon a sufficient showing, a court may order that the discovery or inspection of material which is otherwise required be denied, restricted or deferred. The final decision on whether to enter such an order is a matter for the discretion of the district court and such an order will not be overturned absent an abuse of that discretion. United States v.

Merrill, 746 F.2d 458, 465 (2d Cir. 1985). The Jencks Act does not create a proprietary right to any government witness's statements. The Act requires only that the government make these statements available to the defendants for the purposes of cross-examination, and defines the timing of such disclosures. See United States v. Garcia, 406 F. Supp. 2d 304, 305 (S.D.N.Y. 2005) ("Jencks requires the Government to produce copies of its witnesses' statements for inspection by the defense, for purposes of cross-examination. It does not give defendants a property interest in such statements, or require the multiplication of copies of internal prosecution notes or reports for whatever use the defendants choose to make of them.").

As courts have held, the danger posed to witnesses as a result of the unwarranted disclosure of discovery and Jencks Act materials is significant. Cooperating and civilian witnesses who testify and make recordings of their criminal co-conspirators are subject to harassment or worse. Dissemination of Jencks Act material increases the risk to cooperating witnesses, even if their cooperation has previously been disclosed. The court in Garcia explained as follows:

> There will be cases . . . in which a casual attitude toward the handling of 3500 material is ill-advised . . . . In particular, the wide dissemination of statements by cooperating witnesses who are regarded as 'snitches' or 'rats' by their criminal associates . . . poses obvious dangers. It is not enough to say, as the defendants argue in this case, that the damage is done by the mere disclosure that a witness has cooperated with the authorities. Hard evidence of the witness's betrayal can facilitate retaliation or intimidation of the witness. It is therefore appropriate, in a case where such retaliation may be feared, to restrict the circulation of such material.

Garcia, 406 F. Supp. 2d at 306.

A protective order preventing further dissemination of this material will not prejudice the defendants since they will have access to the material and may cross-examine the government's cooperating witness about statements and conduct during the consensually-recorded conversations at trial. Similar motions have been made, and granted, in trials in this district. See, e.g., United States v. Basciano, No. 03-929 (NGG), Docket

No. 420, at 28 (E.D.N.Y.) (Order dated January 3, 2006); United States v. Badalamenti, et al., No. 05-060 (NGG), Docket Nos. 49, 67, 140, 147.

The government respectfully requests that the Court enter the enclosed proposed Protective Order in this case. Defense counsel consent to this request.

Respectfully submitted,

LORETTA E. LYNCH
UNITED STATES ATTORNEY

By: /s/
Nicole M. Argentieri
Darren A. LaVerne
Assistant U.S. Attorneys
(718) 254-6232/6783

Enclosure

cc: Defense Counsel (By ECF)(w/ enclosure)

Exhibit D

EAG/AL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

NEIL MESSINA, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - X

PROPOSED ORDER
Cr. No. 11-31 (SLT)

Upon the February 7, 2011 application of LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Elizabeth Geddes and Allon Lifshitz,

IT IS HEREBY ORDERED that the compact discs and video digital recordings containing consensual recordings that were ~~disclosed~~ made available to the defendants in the above-captioned case, ~~in a~~ by the government's letter dated January 31, 2011, may not be disseminated beyond the defendants, their attorneys and their attorneys' legal staff;

kan

IT IS FURTHER ORDERED that these recordings and any copies made of these recordings be returned to the government at the conclusion of this case.

Dated: Brooklyn, New York
February 25, 2011

THE HONORABLE Kiyo A. Matsumoto
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

EAG/AL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

JERRY BALZANO, et al.,

Defendants.

- - - - - - - - - - - - - - - - - X

PROPOSED ORDER
Cr. No. 11-32 (SLT)

Upon the February 7, 2011 application of LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Elizabeth Geddes and Allon Lifshitz,

IT IS HEREBY ORDERED that the compact discs and video digital recordings containing consensual recordings that were made available ~~disclosed~~ to the defendants in the above-captioned case, by the government's ~~in a~~ letter dated January 31, 2011, may not be disseminated beyond the defendants, their attorneys and their attorneys' legal staff;

Kam

IT IS FURTHER ORDERED that these recordings and any copies made of these recordings be returned to the government at the conclusion of this case.

Dated: Brooklyn, New York
February 25, 2011

THE HONORABLE Kiyo A. Matsumoto
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

EAG/AL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

ANDREW RUSSO, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - X

PROPOSED ORDER
Cr. No. 11-30 (SLT)

Upon the February 3, 2011 application of LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Elizabeth Geddes and Allon Lifshitz, and upon the oral grant of the government's application by Judge Townes at the status conference dated February 4, 2011,

KAM IT IS HEREBY ORDERED, nunc pro tunc to Feb 4, 2011, that the compact discs and video digital recordings containing consensual recordings that were ~~disclosed~~ made available to the defendants in the above-captioned case, ~~in a~~ by the government's letter dated January 31, 2011, may not be disseminated beyond the defendants, their attorneys and their attorneys' legal staff; Kam

KAM IT IS FURTHER ORDERED, nunc pro tunc to Feb 4, 2011, that these recordings and any copies made of these recordings be returned to the government at the conclusion of this case.

Dated: Brooklyn, New York
February 25 2011

THE HONORABLE Kiyo A. Matsumoto
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK